



## **FACTUAL HISTORY**

On November 29, 2009 appellant, then a 57-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on November 28, 2009 he sustained injuries to his upper right leg and knee and left lower leg as the result of stepping off a sidewalk to help a driver back up. He stopped work on November 29, 2009, but returned to regular work on August 31, 2010.

OWCP accepted the claim for right thigh contusion, right lateral collateral ligament and knee sprain, right knee contusion, and other and unspecified right medial meniscus derangement, and authorized right knee arthroscopic surgeries, which were performed on June 18, 2010 and December 9, 2011. By decision dated July 13, 2012, it accepted appellant's claim for a recurrence of disability beginning October 5, 2011.<sup>2</sup>

Appellant continued to submit frequent progress notes from his treating physician, Dr. Stuart T. Styles, Board-certified in orthopedic surgery, who continued to report that appellant was unable to return to work.

On August 8, 2012 OWCP referred appellant to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine appellant's disability status.

In a September 9, 2012 report, Dr. Sultan, based upon a review of the statement of accepted facts, medical records and physical examination, concluded that appellant's accepted conditions had resolved. He noted that the accepted conditions were right knee and thigh contusions, right knee sprain, and right knee derangement. Dr. Sultan opined that these conditions had resolved by the June 2010 and December 2011 surgeries. He also opined that appellant was capable of performing the duties of his date-of-injury job.

In a report dated September 24, 2012, Dr. Styles reported that appellant had chronic right knee pain and developed quadriceps atrophy. He opined that appellant was disabled from his date-of-injury job, but was capable of performing a light-duty or sedentary position.

In a January 2, 2013 report, Dr. Styles reported that appellant had intermittent difficulties with his right knee and opined that appellant continued to be disabled from work.

In a March 11, 2013 progress report, Dr. Styles released appellant to return to work with restrictions including no lifting or pulling more than 80 pounds.

The record reflects that appellant returned to full duty on May 6, 2013.

On June 27, 2013 appellant filed a claim for a recurrence of disability (Form CA-2a) beginning May 9, 2013. He noted that he returned to two and one-half days of orientation on May 6, 2013 and then to full-duty work on May 8, 2013. On May 9, 2013 appellant's manager

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<sup>2</sup> A Notification of Personnel Action (Form SF-50) dated August 27, 2014 reported that the Office of Personnel Management (OPM) had approved appellant's disability retirement and that his retirement was effective August 14, 2014.

informed him that no work was available within the restrictions noted on a duty status report (Form CA-17).

In a July 15, 2013 report, Dr. Styles noted that appellant had been released to return to modified duty, but instead had returned to full-duty work. He indicated that at the time he released appellant to return to work he had clearly noted appellant's restrictions, which did not include moving containers weighing hundreds of pounds or using ladders. Dr. Styles opined that appellant was disabled from performing full-duty work, but was capable of working with restrictions.

By decision dated August 16, 2013, OWCP accepted appellant's recurrence claim as the employing establishment failed to provide him a job offer within the restrictions set by his physician.

In a January 9, 2014 letter, OWCP referred appellant for an impartial medical examination to Dr. George Burak, a Board-certified orthopedic surgeon, due to an unresolved conflict in the medical opinion evidence between Drs. Sultan and Styles on the issues of diagnoses, necessity for surgery, continuing disability, and causal relationship between his current condition and the accepted work-related injury.

By letter dated January 22, 2014, OWCP placed appellant on the periodic rolls for temporary total disability, effective January 12, 2014.

In a report dated February 11, 2014, Dr. Burak, based upon review of a statement of accepted facts, medical history, and medical evidence, concluded that appellant had a mild disability due to the accepted right knee employment injury. A physical examination revealed meniscal irritations, mild crepitus, a normal gait pattern, no instability, mild grinding at extremes of motion, and no atrophy. Range of motion using a goniometer included 140 degrees contralateral knee, 135 degrees right knee range of motion, and 30 degrees of flexion at the varus and valgus. Based on his examination, Dr. Burak found no evidence supporting Dr. Styles diagnosis of quadriceps atrophy. He concluded that appellant was capable of working full time with restrictions which included avoiding excessive kneeling, climbing, and squatting, and no pushing objects weighing more than 50 pounds on a regular basis.

In a June 25, 2014 supplemental report, Dr. Burak corrected several errors in his prior report and noted that his opinion remained unchanged with respect to appellant's work restrictions.

On July 29, 2014 Dr. Burak completed a work capacity evaluation form (Form OWCP-5c) containing work restrictions for appellant, which were permanent. He indicated that appellant was capable of working eight hours per day with restrictions including eight hours per day of sitting, reaching above the shoulder, and twisting; up to four hours per day of walking, standing, bending/stooping, and pushing, pulling, and lifting up to 50 pounds; up to two hours of operating a motor vehicle at work and operating a motor vehicle to and from work; and no squatting, kneeling, or climbing.

On August 12, 2014 the employing establishment offered appellant the modified position of garage man. The job was located at the Manhattan Vehicle Maintenance Facility with

nonscheduled days off Saturday and Sunday. The job description listed duties to be performed up to eight hours per day included lubricating trucks while trucks are on a lift; change filter cleaners and crankcase oil and cleaning case conforming with vehicle mileage and instructions; making necessary repairs and changing tires while trucks are on a lift; steam cleaning and washing trucks; assisting in performing automotive repairs; oils and fuels trucks; cleans garage, swing room, garage office, and washroom when assigned; performs other duties as assigned; and follows established procedures, safety precautions, and safe work methods while performing job duties. The work restrictions for the position included sitting up to eight hours per day; up to four hours per day of walking, standing, bending, and stooping; up to two hours per day of operating a motor vehicle at work and operating a motor vehicle to and from work; no climbing, squatting, or kneeling; and up to four hours per day of lifting, pushing, and pulling up to 50 pounds.

In a letter dated August 28, 2014, OWCP advised appellant of its determination that the garage man position offered by the employing establishment on August 12, 2014 was suitable. It indicated that the position was based upon the opinion of Dr. Burak, an impartial medical examiner, who opined that he was capable of working eight hours per day with restrictions. The employing establishment confirmed that the position remained available to appellant. OWCP instructed him that he must, within 30 days, either accept the position or provide a written explanation of the reason he did not accept the position or he could lose his right to compensation under 5 U.S.C. § 8106(c) of FECA.

On September 5, 2014 OWCP received an August 27, 2014 letter from appellant to the employing establishment declining the August 12, 2014 job offer. Appellant attached a copy of a letter from OPM approving his application for disability retirement. He argued that the position exceeded the work restrictions set by Dr. Burak, which included no squatting, repetitive kneeling, excessive climbing, and excessive pushing of objects weighing more than 50 pounds. Appellant also contended that the duties noted in the position were vague as to putting the truck on the lift, the weight restrictions for the tires, and that duties numbers 5 and 9 were nonspecific.

In September 23, 2014 letter, appellant stated that he refused the August 12, 2014 job offer and provided his reasons in an August 27, 2014 letter to the employing establishment. He informed OWCP that he had been approved for disability retirement by OPM and was separated from the employing establishment, effective August 17, 2014.

In an October 3, 2014 letter, OWCP found that the reasons given by appellant for refusing the offered position were invalid. It gave him 15 additional days to accept the position or to make arrangements to report to this position. OWCP noted that if appellant did not accept the position within 15 days of the date of the letter, his right to compensation for wage loss or a schedule award would be terminated pursuant to section 8106 of FECA. It would not consider any further reasons for refusal of the offered position.

By letter dated October 16, 2014, appellant's counsel wrote that appellant was medically and physically unable to accept the August 12, 2014 job offer as the assignment duties were inconsistent with his medical restrictions.

By decision dated October 24, 2014, OWCP terminated appellant's eligibility for wage-loss compensation benefits, effective that date, as it found that he had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).

In a January 27, 2015 letter, appellant's counsel requested reconsideration. He contended that the offered position was not suitable as it required lifting tires weighing between 92 and 197 pounds and excessive kneeling is required in order to set the arms to lift the trucks for lubrication or changing oil. Counsel indicated that he was submitting the manufacturer's specification sheets. He provided the tire model numbers and weights for the four different size tires used by the employing establishment's light and heavy duty trucks. Counsel stated that appellant's work restrictions supported a more sedentary position. He also contended that the statement of accepted facts was inaccurate as OWCP has failed to accept all conditions caused by the November 28, 2009 employment injury including a right medial meniscus posterior horn tear, partial tears of the posterior cruciate and lateral collateral ligaments, and femoropatellar joint cartilage thinning. Counsel argued that Dr. Sultan's opinion was stale and insufficient as a basis for a determination of a conflict at the time of the referral to Dr. Burak. In support of his request, appellant submitted a November 16, 2014 medical reports from Dr. Styles.

On November 6, 2014 Dr. Styles provided a history of appellant's November 28, 2009 employment injury and the medical treatment provided. Based upon appellant's right knee condition, he noted that appellant had limitations on kneeling, lifting, long walking, and jumping. Dr. Styles opined that working in a garage was not reasonable with appellant's work restrictions and to prevent arthritic changes. He concluded that appellant was capable of performing sedentary work and that the job duties of the offered position were outside his work restrictions.

OWCP subsequently received progress notes from Dr. Styles including a March 31, 2014 report noting that appellant's gait had altered and that he complained of shooting pain from the knee to the hip. A June 30, 2015 progress note reported right leg radiculopathy due to changes in appellant's gait, which Dr. Styles attributed to the November 28, 2009 employment injury.

By decision dated August 21, 2015, OWCP denied modification of its prior decision. It made findings regarding his arguments on reconsideration. OWCP specifically found that neither appellant nor the employing establishment had provided proof that he would have to use or lift any of the specified tires that exceeded his weight restrictions.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of FECA states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.<sup>3</sup> Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits under section 8106(c) for refusing to accept or neglecting to perform suitable work.<sup>4</sup> The Board has recognized that

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<sup>3</sup> 5 U.S.C. § 8106(c)(2).

<sup>4</sup> *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to future compensation and, for this reason, will be narrowly construed.<sup>5</sup>

To justify termination, OWCP must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.<sup>6</sup> According to OWCP's procedure, a job offer must be in writing and contain a description of the duties to be performed and the specific physical requirements of the position.<sup>7</sup> Section 10.516 of the Code of Federal Regulations<sup>8</sup> provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.<sup>9</sup>

### ANALYSIS

OWCP accepted that, as a result of the November 28, 2009 employment injury, appellant sustained right thigh contusion, right lateral collateral ligament and knee sprain, right knee contusion, and other and unspecified right medial meniscus derangement. It authorized two right knee arthroscopic surgeries. Dr. Styles advised that appellant was capable of working with restrictions and recommended a sedentary position. Appellant was referred for a second opinion evaluation with Dr. Sultan who opined that appellant's accepted condition had resolved and he was capable of performing his date-of-injury job. OWCP found a conflict in the medical opinion evidence and referred appellant to Dr. Burak for an impartial medical examination.

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA. The statute provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.<sup>10</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>11</sup> The Board finds that, due to the differing opinions on appellant's disability and whether the accepted conditions had resolved between Dr. Sultan and Dr. Styles, OWCP properly determined that there was a conflict of medical evidence.

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<sup>5</sup> *H. Adrian Osborne*, 48 ECAB 556 (1997).

<sup>6</sup> *T.S.*, 59 ECAB 490 (2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

<sup>7</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(a) (June 2013).

<sup>8</sup> 20 C.F.R. § 10.516.

<sup>9</sup> See *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

<sup>10</sup> 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

<sup>11</sup> *R.C.*, 58 ECAB 238 (2006).

In a February 11, 2014 report, Dr. Burak concluded that appellant had a mild disability due to the accepted right knee employment injury based on the physical examination findings. He also found no evidence supporting a diagnosis of quadriceps atrophy. On July 29, 2014 Dr. Burak completed a work capacity evaluation form indicating that appellant could work eight hours per day with restrictions of up to eight hours of sitting, reaching above the shoulder, and twisting; up to four hours per day of walking, standing, bending/stooping, and pushing, pulling, and lifting up to 50 pounds; up to two hours of operating a motor vehicle at work and operating a motor vehicle to and from work; and no squatting, kneeling, or climbing. The Board finds that Dr. Burak's opinion is entitled to the special weight of the medical evidence accorded an impartial medical examiner. Dr. Burak based his opinion on a proper factual background, review of the medical evidence, and physical examination and opined that appellant was capable of light-duty work.

On August 12, 2014 the employing establishment provided appellant with a limited-duty position as a garage man. The employing establishment listed the duties of the position as lubricating trucks while the trucks were on a lift, changing crankcase oil and filter cleaners, making necessary repairs and changing tires while trucks are on a lift, steam cleaning and washing trucks, assisting with automotive repairs, oiling and fueling trucks, cleaning the garage, swing room, garage office and washroom as assigned, and performing other duties as assigned. The work restrictions for the position included sitting up to eight hours per day; up to four hours per day of walking, standing, bending, and stooping; up to two hours per day of operating a motor vehicle at work and operating a motor vehicle to and from work; no climbing, squatting, or kneeling; and up to four hours per day of lifting, pushing, and pulling up to 50 pounds. The Board finds that the physical requirements of the offered position of garage man fell within appellant's work restrictions. The weight of the medical evidence establishes that he was no longer totally disabled from work and had the physical capacity to perform the duties listed in the August 12, 2014 job offer. Thus, OWCP properly relied on Dr. Burak's opinion in finding the garage man position suitable.

In accordance with the procedural requirements under 5 U.S.C. § 8106(c), OWCP advised appellant on August 28, 2014 that it found the job offer of garage man to be suitable and gave him an opportunity to provide reasons for refusing the position within 30 days. It advised him in an October 3, 2014 letter that his reason for refusing based on OPM's acceptance of his claim for disability retirement was insufficient<sup>12</sup> and that he had 15 additional days to accept the offered position. The Board finds that OWCP followed the established procedures prior to the termination of compensation pursuant to section 8106(c).

The Board finds that the position was medically and vocationally suitable and OWCP complied with the procedural requirements of section 8106(c). OWCP therefore met its burden of proof to terminate appellant's compensation benefits based on his refusal to accept suitable work.

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<sup>12</sup> The Board had long held that electing to retire is not a justifiable reason to refuse an offer of suitable work. *Robert P. Mitchell*, 52 ECAB 116 (2000). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (June 2013)

Subsequent to terminating appellant's benefits, OWCP received a November 16, 2014 medical report from Dr. Styles, who advised that appellant could not perform the offered position of garage man as he found the job duties were outside appellant's work restrictions and could cause arthritic changes. It also received progress notes dated March 31 and June 30, 2014 from Dr. Styles noting a gait change and right leg radiculopathy due to the gait change, which the physician attributed to the November 28, 2009 employment injury. Dr. Styles did not provide any explanation supporting his opinion. In addition, Dr. Styles was on one side of the conflict in the medical opinion that Dr. Burak resolved, and his report and progress notes are insufficient to overcome the special weight accorded the impartial specialist or to create a new medical conflict.<sup>13</sup>

The Board finds that Dr. Burak's report established that appellant was capable of performing the job offered and the position was suitable, and thereby OWCP was justified in its October 24, 2014 termination of benefits as he refused an offer of suitable work.

On appeal appellant's counsel argues that medical reports from appellant's treating physician clearly establish that the offered position was outside his restrictions. He also argues that the referrals to a second opinion physician and to an impartial medical examiner were unreasonable. The Board notes, however, that there is no indication of record that any of OWCP's medical referrals were improper and that OWCP has the discretion to have a claimant submit to an examination by a physician designated by OWCP as frequently and at the times and places as may be reasonably required.<sup>14</sup> Counsel also contends that the medical evidence was insufficiently rationalized, equivocal, and insufficient to constitute the weight of the medical evidence. As discussed above, the Board finds that OWCP properly referred appellant to Dr. Burak to resolve the conflict in the medical opinion evidence and that his opinion was well rationalized and sufficient to establish that the offered position was suitable.

### **CONCLUSION**

The Board finds that OWCP properly terminated appellant's monetary compensation effective October 24, 2014 on the basis that he refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

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<sup>13</sup> *Alice J. Tysinger*, 51 ECAB 638 (2000); *Barbara J. Warren*, 51 ECAB 413 (2000)

<sup>14</sup> *J.C.*, Docket No. 09-609 (issued January 5, 2010); *S.B.*, 58 ECAB 267 (2007); *William B. Webb*, 56 ECAB 156 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 21, 2015 is affirmed.

Issued: July 11, 2016  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board